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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91204456
Party	Plaintiff Intrust Financial Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Intrust Financial Corporation,	)	
	)	
Opposer,	)	
	)	Opposition No. 91204456
v.	)	Application Serial No.: 85/250992
	)	Mark: NTRUST
nTrust Corp.,	)	
	)	
Applicant.	)	
_____	)	

OPPOSER INTRUST FINANCIAL CORPORATION'S
REPLY BRIEF ON THE MERITS

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Intrust Financial Corporation, Opposer, v. nTrust Corp., Applicant.	)	Opposition No. 91204456 Application Serial No.: 85/250992 Mark: NTRUST

OPPOSER INTRUST FINANCIAL CORPORATION'S
REPLY BRIEF ON THE MERITS

From the first sentence of its Brief on the Merits, nTrust distorts the inquiry that is properly before the Board in this matter. The Board need not decide what is, or is not, a "banking service." Rather, the question is whether the NTRUST mark that nTrust seeks to register is so similar to the INTRUST marks that it is likely to cause confusion among consumers. Guiding this inquiry are the factors laid out in *Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. (BNA) 563 (C.C.P.A. 1973). As demonstrated by Intrust, these factors—including the key factors of the similarity of the services described in nTrust's application and Intrust's registrations and the similarity of the marks—weigh overwhelmingly in Intrust's favor. Therefore, nTrust's application should be denied.

I. The Services Described in nTrust's Application and Intrust's Registration Are Related and May Emanate from the Same Source.

In examining the similarity of the services offered by nTrust and Intrust, the Board must consider whether the "financial services conducted via electronic communications networks" described in nTrust's application and the "banking services" described in Intrust's registrations are related in the minds of the consuming public. *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 54 U.S.P.Q.2d (BNA) 1894, 1898 (Fed. Cir. 2000). "[T]he greater the degree of similarity between applicant's mark and the cited registered mark, the lesser the degree of similarity between

applicant's goods and registrant's goods that is required to support a finding of likelihood of confusion." *In re Opus One Inc*., 60 U.S.P.Q.2d (BNA) 1812, 1815 (T.T.A.B. 2001) (*citing In re Shell Oil Co*., 992 F.2d 1204, 26 U.S.P.Q.2d 1687 (Fed. Cir. 1993)). In cases were the marks are essentially the same, as in this case, "it is only necessary that there be a viable relationship between the goods in order to support a finding of likelihood of confusion." *See In re Concordia International Forwarding Corp*., 222 U.S.P.Q. (BNA) 355, 356 (T.T.A.B. 1983).

The Board, therefore, is not charged with determining whether nTrust and Intrust actually offer identical services. It is well settled that goods and services need not be identical or even competitive in order to support a finding of likelihood of confusion. *In re Melville Corp*., 18 U.S.P.Q.2d (BNA) 1386, 1388 (T.T.A.B. 1991). The question instead is whether the services ***described in nTrust's application and nTrust's registration*** will be perceived by the consuming public as related enough to cause confusion as to the source or origin of the services. *Hewlett-Packard Co. v. Packard Press, Inc*. 281 F.3d 1261, 1267, 62 U.S.P.Q.2d (BNA) 1001 (Fed. Cir. 2002) (finding that the "data and information processing" description in a trademark application was very similar to registrations covering consulting services, whether for data processing or for data processing products). "[I]t is enough that goods or services are related in some manner or that circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services." *In re Melville*, 18 U.S.P.Q.2d (BNA) at 1388. Here, the relatedness of banking services described in Intrust's registration and offered by Intrust under its INTRUST marks, and the financial services, including bill pay and card products, described in nTrust's application, greatly surpass the "related in some manner" factor.

nTrust does not—and cannot in good conscience—argue that banking and finance are not related, or that banking services and financial services do not or cannot emanate from the same source. nTrust instead relies on a convoluted discussion of federal banking regulations and citation to cases that are easily distinguishable or irrelevant to the proceeding before the Board to argue that "financial services conducted via electronic communications networks" are, on their face, different from the "banking services" described in the INTRUST registrations.[1] Applicant's Brief on the Merits ("Applicant's Brief") at p. 13. But neither the relevant authorities nor the evidence support nTrust's argument.

A. The Relevant Authorities Demonstrate that the Services Described in nTrust's Application and Intrust's Registrations Are Related.

Courts have accepted that banks and non-banks commonly offer the same or similar services, that banking services include financial services (and vice-versa), and that banking services include services that non-banks provide, such as bill payment and investment advice. In *Citigroup, Inc. v. City Holding Co.*, 2003 U.S. Dist. LEXIS 1845, *5 (S.D.N.Y. Feb. 10, 2003),[2] the court noted that Citigroup "provides a broad range of financial services to consumers and corporate customers, *including banking services such as* checking accounts, savings accounts, loans, credit and debit cards, insurance, travelers checks, mortgages, *bill payment services*, brokerage services and investment advisory services." (emphasis added). Thus, banking was one of the financial services that Citigroup provided. Likewise, the plaintiff in *Midwest Guaranty Bank v. Guaranty Bank*, 270 F. Supp. 2d 900, 906 (E.D. Mich. 2003) was a bank that "provided financial services and products" and successfully enjoined the defendant, Guaranty Bank, from using its mark in

1 As described on page 6 of its Brief on the Merits, Intrust has registered multiple INTRUST marks. Because the majority of these marks, including the INTRUST mark, are for "banking services," for purposes of this Reply, Intrust will focus on the "banking services" described in its registrations.

2 nTrust uses this case to argue that courts have held that banks are limited to providing only "traditional banking activities," even though the court clearly describes the bank as offering a broad range of financial services that non-banks also provide. *See* Applicant's Brief at p. 25.

conjunction "with its banking and related financial services." The services of the bank, therefore, included related financial services.

The Board also has recognized the relatedness of banking and financial services. In *In re Hamilton Bank*, 222 U.S.P.Q. (BNA) 174 (T.T.A.B. 1984), the applicant presented twenty registered marks that contained the word "KEY," each for "some sort of financial service." *Id*. at 177. The Board found that, "Most relate specifically to banking services; all are related closely enough so that use of confusingly similar marks to identify the services would create a likelihood of confusion." *Id*. Although the Board concluded that the applicant's stylized "KEY" mark distinguished it from other marks that used the word "KEY," it also recognized banking services as a sort of financial service. *Id*. The Board determined that all of the registrations—including registrations that used the word "KEY" in connection with "Loan services," "Financial, consulting and administrative services with respect to insurance annuities," and "Financial services, namely banking services rendered to customers"—were related closely enough that the use of confusingly similar marks to identify the services would create a likelihood of confusion. *Id*.

In *AIM Management Group Inc. v. Old Kent*, Serial No. 74/170,506, 1996 TTAB LEXIS 267, *1 (Aug. 2, 1996) (unpublished), AIM Management Group was the owner of a mark "for mutual fund brokerage, management, investment advisory and distribution services." *Id*. It opposed the applicant's mark AIM for "financial services, namely, banking services." The issue before the Board was "whether applicant's mark AIM for banking services so resembles opposer's previously used and registered marks . . . for mutual fund brokerage, management, investment advisory and distribution services as to be likely to cause confusion . . . ." *Id*. at *4. It noted that mutual funds are sold through banks and that newspaper articles discussed the sale of mutual funds

by banks.[3] *Id*. at *7. Thus, the Board concluded that the marks were likely to cause confusion as to source or sponsorship. *Id*. at *8.

Finally, in *In re Vera Payment Plans, LLC*, Serial Nos. 85/814,705 and 85/866,509, 2015 TTAB LEXIS 37 (Feb. 17, 2015) (unpublished), the Board concluded that:

> [T]he sentiment is that consumers have increasingly come to expect that banks are offering under the same brand a variety of financial services to meet all of their clients' financial needs. The evidence, as already discussed, demonstrates that not only do banks or other financial institutions render a variety of financial services, but they do so in an industry specific manner.

Id. at *23. Thus, the applicant's mark for "financial services, namely providing financing for motor vehicle dealers to offer vehicle service contracts" was sufficiently related to the Opposer's mark for "financial advice and consultancy services" as to be likely to cause confusion. *Id*. at *1-2.

3 Intrust similarly has offered articles and other evidence showing that banks offer mobile payment and person-to-person payment options. *See, e.g.*, Exs. K-5; K-14; K-17; K-30 through K-53.

B. nTrust's Arguments Are Not Supported by the Authorities to Which It Cites.

B.1. The banking regulations do not support nTrust's position.

nTrust asks the Board to adopt a hard-line definition of banking services as including "only services which a banking charter or license is uniquely required to provide." Applicant's Brief at p. 27. But nTrust's request is not based on a proper reading of the banking regulations to which it cites. First, such a definition would turn the banking regulations of 12 C.F.R. §§ 7.1000, *et seq*., into a limitation on what constitutes the business of a bank, rather than what they are—a list of types of transactions that Congress identified as the enumerated powers of a national bank that could not be preempted by state regulation. *See Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) ("In using the word 'powers,' the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one interpreting the grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law."). Second, such a definition takes too narrow a view of the actual banking regulations, which include among a national bank's incidental powers the issuance of "electronic stored value systems," such as pre-paid card products that are not tied to a bank account, 12 C.F.R. § 7.5002; *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 189 (2d Cir. 2007),—precisely the type of services that nTrust intends to offer and the "financial services conducted via electronic communications networks" described in its application.

A.1. The other authorities cited by nTrust are distinguishable.

nTrust further attempts to support its request by relying on inapt legal authority to argue that "courts looking at what constitutes 'banking services' have consistently limited them to traditional banking activities." Applicant's Brief at p. 24. In most of the cases cited by nTrust, the court is simply describing some of the services offered by a bank for purposes of background information introducing the parties. *See Flagstar Bank, FSB v. Freestar Bank, N.A.*, 687 F. Supp.

2d 811, 818 (C.D. Ill. 2009); *Oriental Fin. Group, Inc. v. Cooperativa de Ahorro y Credito Oriental*, 698 F.3d 9, 13, 105 U.S.P.Q.2d 1128, 1129-30 (1st Cir. 2012); *Alliance Bank v. New Century Bank*, 742 F. Supp. 2d 532, 538, 98 U.S.P.Q.2d 1292, 1295-96 (E.D. Pa. 2010); *CNB Fin. Corp. v. CNB Cmty. Bank*, No. 03-6945, 2004 U.S. Dist. LEXIS 21483, *3 (E.D. Pa. Sept. 30, 2004); *Citigroup Inc. v. City Holding, Co*., No. 99 civ. 10115, 2003 U.S. Dist. LEXIS 1845, *5-6 (S.D.N.Y. Feb. 10, 2003). There is nothing in these decisions that could be read to limit banking services as requested by nTrust. Indeed, the opposite is true—even within some of these cases offered by nTrust as examples of "traditional" banking services, there are banking services listed that also can be offered by non-banks, such as loan products, investment accounts, and advising. *See, e.g., Oriental Fin, Group*, 698 F.3d at 13; *Alliance Bank*, 742 F. Supp. 2d at 538; *CNB Fin. Corp*., 2004 U.S. Dist. LEXIS 21483 at *3; *Citigroup, Inc*., 2003 U.S. Dist. LEXIS 1845 at *5-6. Nor do the other cases that nTrust cites support its request, as they either apply a completely different standard than what is presently before the Board or make no findings whatsoever as to what is, or is not, a banking service.

For example, in *Interstate Net Bank v. NetBank, Inc.*, 348 F. Supp. 2d at 340, 344, 77 U.S.P.Q.2d (BNA) 1015, 1018 (D.N.J 2004), the court was not analyzing what exactly was encompassed in a registration for banking services, but rather was considering whether an assignee actually offered substantially similar services to the assignor for purposes of determining whether there has been an invalid assignment in gross. *Interstate* involved the assignment of the NETBANK trademark registration by a software engineering consulting company called Software Agents to the defendants. *Id*. at 342, 349, 77 U.S.P.Q.2d at 1022. The plaintiffs argued that the assignment was invalid because the defendants, who offered a full range of traditional banking services over the Internet and had not purchased the physical assets of its assignor, had not continued a "substantially similar" service to that of Software Agents. *Id*.. Users of the Netbank

service could purchase electronic money coupons, called NetCash, in amounts of no more than $100. *Interstate*, 348 F. Supp. 2d at 343, 177 U.S.P.Q.2d at 1017. They could use this NetCash to pay merchants, but only if the merchant also had registered to use the system. *Id*. at 343, 77 U.S.P.Q.2d at 1018. To convert NetCash to real money, Software Agents would send the merchant a check for the amount in the merchant's account after subtracting a processing fee. *Id*. There were no direct payments or immediate transfers, and NetCash payments could only be made between registered users. The court ruled that this was not substantially similar to the services offered by the defendants, who offered a full range of traditional banking services over the Internet, and declared the assignment an invalid assignment in gross. *Id*. at 349, 351. The *Interstate* case involves a completely different standard as well as a highly distinguishable factual background. Not only was the substantially similar standard very different from the *DuPont* factor considered for purposes of determining likelihood of confusion in this case, but the services that the court was analyzing also are distinguishable. The services that Software Agents provided under the NETBANK mark were much more limited than nTrust's cloud-based services, which would allow "funds to be moved instantaneously from a sending user's cloud account to a receiving user's cloud account" and give users the ability to load money onto a prepaid card that can be used to make purchase or ATM withdrawals. Applicant's Brief at p. 6; Deposition of Robert MacGregor ("MacGregor Dep.") pp. 17:2-14; 27:9-23.

Checkpoint Systems, Inc. v. Check Point Software Tech, Inc., 269 F.3d 270, 288, 60 U.S.P.Q.2d (BNA) 1609, 1620 (3d Cir. 2011), another case cited by nTrust, involved an infringement and unfair competition action brought by a company that manufactured security monitoring devices against a company that wrote computer programs. The court held that the products sold under the already-registered marks operated in distinct niches, which banking and finance do not. *Id*.

Plus Products, Inc. v. Plus Discount Foods, Inc., 722 F.2d 999, 222 U.S.P.Q. (BNA) 373 (2d Cir. 1983), likewise involved an infringement action where the senior user of a mark sought to prevent the use of marks by a junior user. The plaintiff had registered several PLUS marks for high protein vitamin products, lotions, moisturizers, and other toiletries, and dietary supplements. *Id*. at 1002, n.3, 222 U.S.P.Q. at 375 n.3. When the defendant sought to register a PLUS mark for supermarket services, the examiner refused the registration because of a likelihood of confusion with the plaintiff's registration. *Id*. at 1003, 222 U.S.P.Q. at 376. The defendant, nevertheless, used PLUS as a trade name, and the court considered whether the actual products offered by the parties, which were not competing products, would confuse consumers. *Id*. at 1004, 222 U.S.P.Q. at 376-77. If anything, this case shows that a mark in an application still can cause likelihood of confusion with a mark in a registration and should be denied even if the actual products are not competitive and do not overlap.

Nutri/System Inc. v. Con-Stan Industries, Inc., 809 F.2d 601, 606, U.S.PQ.2d (BNA) 1809, 1812 (9th Cir. 1987) also was a trademark infringement case. The portion of the decision cited by nTrust considered whether direct competition existed, which need not be established to show likelihood of confusion, although there is evidence that nTrust intends to directly compete with banks. *In re Melville Corp.,* 18 U.S.P.Q.2d at 1388 (finding services do not need to be identical or competitive in order to support a likelihood of confusion). Similarly, in *Harlem Wizards Entertainment Basketball, Inc. v. NBA Properties, Inc*., 952 F. Supp. 1084, 1095 (D.N.J. 1997), the court was applying a reverse confusion inquiry, where the "showing of proof necessary for a plaintiff to prevail depends upon whether the goods or services offered by the trademark owner and the alleged infringer are competitive or noncompetitive," a showing that Intrust need not make to establish the relatedness of the listed services.

Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc., 718 F.2d 1201, 220 U.S.P.Q. (BNA) 786 (1st Cir. 1983) (superseded by statute on other grounds), was another infringement action where the parties conceded that the products involved (a 350-550 pound blood analyzer that cost between $35,000 and $65,000, versus drugs sold for human consumption) had few, if any, similarities. *Id.* at 1205-06, 220 U.S.P.Q. at 790. A critical detail to the court's decision that the plaintiff's pharmaceutical products were sold by salespeople who would make it crystal clear who manufactured the drugs sold, and the purchasers were hospitals that would make a careful determination of the source of the drug. *Id.* at 1206-07, 220 U.S.P.Q. at 790-91. Further, the respective products would be purchased by people in different departments. *Id.* at 1207, 220 U.S.P.Q. at 791. Therefore, the court concluded it was "inconceivable" that confusion as to the source of the products would occur. *Id.* nTrust, on the other hand, does not depend on physical agents or buildings and allows people to sign up for its services almost anywhere through its website or mobile application. MacGregor Depo. pp. 22:18-23:3; 31:12-25; 88:7-12.

And in *Commerce National Insurance Services, Inc. v. Commerce Insurance Agency, Inc.*, 214 F.3d 432, 55 U.S.P.Q.2d (BNA) 1098 (3d Cir. 2000), both parties claimed infringement by already-registered marks. The portion of the decision cited by nTrust concerns whether a bank, which was the senior user of the mark, would naturally expand into the defendant's industry (insurance) at the time that the defendant began using its mark. The court found that the plaintiff did not offer convincing evidence that a reasonable consumer at the relevant time, 1983, would expect a bank to expand into the insurance industry. *Id.* at 441-442, 55 U.S.P.Q.2d at 1104-05. But that decision says nothing about what consumers can or should expect from their banks in 2015, and the matter that is presently before the Board does not involve the insurance industry.

B. The Evidence Demonstrates that the Services Described in nTrust's Application and Intrust's Registrations Are Related

The evidence before the Board shows that banks can and do offer financial services that are conducted via electronic communications networks. *See* Opposer's Brief on the Merits ("Opposer's Brief") at pp. 16-23. Although nTrust's Response discusses primarily nTrust's person-to-person ("P2P") services (which banks also provide), nTrust's Application also includes stored value cards, direct deposit into bank accounts, and electronic money transfer – services which are commonly associated with banks such as Intrust. Intrust has provided evidence that shows that banks offer the same services, such as P2P services, direct deposit, online banking transfers, and stored value cards. Opposer's Brief at p. 20; Exs. K-1; K-5; K-14; K-17; K-30 through K-53. These bank-provided services and products are more than just related to what nTrust describes in its application – they are essentially identical.

Third party bank registrations show that the services described in nTrust's application and in Intrust's registrations can and do emanate from the same source. Opposer's Brief, p. 17; Exs. E-1; E.4; E-5; E-7; E-11; E-12; E-14. nTrust has not identified any banks that, in today's era, somehow have managed to stay in business without offering some kind of online or mobile services, and it would be hard-pressed to do so. Indeed, although Intrust need not prove that nTrust offers services that are competitive with banks, nTrust's own president has acknowledged that "conventional banks" have responded to consumer demand and "compete with companies moving into the alternative payment space." Opposer's Brief at pp. 22-23; Ex. K-19. The services described in Intrust's registration and nTrust's application are thus so similar that they are of a type that may emanate from a single source and confuse the consuming public as to source or sponsorship. *In re Mucky Duck Mustard Co., Inc*., 6 U.S.P.Q.2d (BNA) 1467, 1470 (T.T.A.B. 1988).

In support of its position, nTrust points out that non-banks offer the services described in nTrust's application. Applicant's Brief at pp. 28-29. But this point has no relevance. The fact that

non-banks may offer the electronic funds transfers, bill payment services, stored value cards, and other services that nTrust describes as part of its application, does not mean that such services are not banking services. *See* Opposer's Brief at p. 17. As shown by Intrust, banking services and financial services conducted via electronic communications networks actually do emanate from the same source. Indeed, nTrust's services are so similar to what a consumer would expect a bank to offer that nTrust took the initiative to address on its website the "Frequently Asked Question" of "is nTrust a bank?" nTrust even acknowledges in its brief that it "tells consumers it is not a bank." Applicant's Brief at p.7. This gives rise to a question that nTrust ignores: if nTrust's services are not of the type that consumers might expect to receive from a bank, then why would nTrust have any need to communicate to them that it is not a bank? The answer is simple and consistent with the relevant authorities: in 2015, the services nTrust offers are so similar to the services that banks provide that consumers could be confused as to whether nTrust is a bank.

II. The INTRUST and NTRUST Marks Are Nearly Identical.

A second significant *DuPont* factor—similarity of the marks as to appearance, sound, connotation, and commercial impression—also strongly favors Intrust. nTrust notes that several of the INTRUST marks include additional features, such as "I TRUST INTRUST," "INTRUST WEALTH MANAGEMENT," and "INTRUST BANK" (stylized), which it argues distinguishes them from the NTRUST mark. Applicant's Brief at pg. 39-40. But, as nTrust reluctantly acknowledges, Intrust also owns the unqualified INTRUST mark, which differs from the NTRUST mark by a single letter. Because the lack of the letter "I" in the NTRUST mark does little, if anything to distinguish it from the INTRUST mark, this factor weighs in favor of the denial of nTrust's application.

nTrust cites *Freedom Savings and Loan Association v. Fidelity Bankers*, 224 U.S.P.Q. 300, 305 n.5 (T.T.A.B. Sept. 28, 1984), for the proposition that Intrust must tolerate marks that "may

have only minor differences." In that case, the Board noted that in the banking industry, certain designations such as "Security," "Metropolitan" "Perpetual," "Mutual," or perhaps even "Freedom" may appear so frequently that they are not very helpful for purposes of differentiating marks. *Id*. The Board goes on to find that in the case before it, there was no differentiation. *Id*. Instead, the "FREEDOM" marks before it were identical. Here, there are likewise no designations to distinguish the NTRUST and INTRUST marks. The only difference is the lack of the letter "I", which is unlikely to change the way that the two words are pronounced. Indeed, during depositions even nTrust's attorney felt the need to spell out the nTrust name to make sure that the witness understood that he was referring to nTrust rather than Intrust:

> Q: Let's talk about my client's application for the mark nTrust, just the letter N, T-R-U-S-T. You testified earlier that you believe that services described on a website you viewed at ntrust.com are similar to services your bank offers. How many times have you accessed ntrust.com?
> A: nTrust with an N?
> Q. Yes.

Deposition of Lisa Elliott ("Elliott Dep."), pp. 259:14-260:21.

Later, to avoid the continuing confusion, counsel for nTrust resorted to referring to nTrust as "my client:"

> Q: So earlier, I believe you testified that nTrust offered services as described on the web pages you visited?
> A: nTrust, with an N, offered services?
> Q: My client, let's just –
> A: Yes.
> Q: And did you testify, if I recall correctly, that you actually used those services?
> A. No.
> Q. Okay. So I – that's what I was trying to clarify. So you did not actually use any of the services offered by my client?

Id., p. 260:8-19.

This deposition testimony reflects the real world: when pronounced, NTRUST and INTRUST sound identical. While nTrust asserts that its name is meant to signify the Internet with

the concept of trust, it does not deny that "trust" is a key component of the NTRUST mark.[4] Applicant's Brief at p. 41. Further, how nTrust intends for its name to be pronounced simply does not matter. Even if nTrust did not intend for its mark to be pronounced similarly to "Intrust," there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner. *In re Viterra, Inc*., 671 F.3d 1358, 1367, 101 U.S.P.Q.2d (BNA) 1905, 1912 (Fed. Cir. 2012). No matter what, when spoken, NTRUST is going to sound the same as INTRUST.

Finally, nTrust hardly can claim dissimilarity, given that it asserts that other uses of "NTRUST" are similar to INTRUST. Robert MacGregor, nTrust's founder and CEO, testified that he believes that the mark Ntrust Wealth Management was similar to Intrust's mark. MacGregor Dep., pp. 3:13-17; 72:17-25. Similarly, Mr. MacGregor believed that the mark Ntrust Financial, LLC was similar to the INTRUST mark. *Id*., pp. 74:25-25:21. Given that nTrust contends that NTrust Wealth Management and Ntrust Financial have marks similar to INTRUST, its argument to the effect that its mark somehow is not very similar defies logic. With logic in mind, the evidence offered in this case supports a finding that the INTRUST and NTRUST marks are nearly identical in appearance, phonetics, connotation, and commercial impression.

III. Other DuPont Factors Support Denial of nTrust's Application.

C. The INTRUST Marks Are Entitled to Protection

nTrust's argument that the INTRUST marks are descriptive is misplaced. As an initial matter, Intrust has offered evidence demonstrating the strength and the extensive promotion of the INTRUST marks. Opposer's Brief at pp. 6-8. Further, the INTRUST marks fall within the "suggestive" category. Suggestive marks connote something about the service such that the

4 nTrust's assertion about the Internet-related connotation of the "n" prefix and its supposed effect on the similarity analysis is a bit of a stretch. Despite rather extensive searches across the Internet, Intrust's counsel was not able to identify any sources that describe "n-" as one of the recognized Internet-related prefixes, such as "e-", "i-", "cyber-", "info-", "techno-", "virtual-", and "net-". But even if this were true, the same logic would apply to Intrust's marks, as a consumer may be just as likely to conclude that the "In" was the equivalent to "Internet."

customer could use his or her imagination and determine the nature of the service. *Freedom Savings & Loan Assoc. v. Way*, 757 F.2d 1176, 1182-83 (11th Cir. 1985) (*citing Citibank, N.A. v. Citibanc Group, Inc*., 724 F.2d 1540 (11th Cir. 1984) for the proposition that "Citibank" is suggestive of a "modern or urban bank" and concluding that "Freedom" was likewise suggestive); *Midwest Guaranty Bank v. Guaranty Bank*, 270 F. Supp. 2d 900, 911 (E.D. Mich. 2003) (finding that the term "Guaranty" suggests that the consumer should trust and feel secure that their money is safe, and is thus more suggestive than descriptive). Generally, if a term is suggestive, it is inherently distinctive and entitled to trademark protection without proof of secondary meaning. *Hasbro Inc. v. Lanard Toys Ltd*., 8 U.S.P.Q.2d (BNA) 1345, 1348 (2d Cir. 1988). Ultimately though, for purposes of determining whether the NTRUST mark is confusingly similar, the INTRUST marks are valid and registered marks entitled to protection regardless of how they are categorized. *Giant Food Inc. v. Rosso & Mastracco, Inc*., 218 U.S.P.Q. (BNA) 521, 526 (T.T.A.B. 1982) ("It is well established that even the owner of a weak mark is entitled to be protected from damage due to a likelihood of confusion with another's use of the same or a confusingly similar mark.").[5]

D. **Potential Purchasers Are Unsophisticated**

nTrust asserts that the fourth *DuPont* factor—the conditions under which buyers to whom sales are made, *i.e.* impulse versus careful purchasing—favors denial of Intrust's opposition because customers will be careful in deciding where to open a bank account. However, nTrust's argument has been rejected by the Federal Circuit and the Board, and there is no evidence that consumers will use extra care in their selection of the products and services offered by Intrust or nTrust.

5 On appeal, the Federal Circuit did not agree with this conclusion, but only because it objected that "it may be perceived that some form of 'damage' must be proved in order to prevail in an opposition or cancellation proceeding, and that is not the law." The Federal Circuit did not disagree with the conclusion that the mark was entitled to protection regardless of strength. *Rosso & Mastracco, Inc. v. Giant Food, Inc*., 720 F.2d 1263, 1265 (Fed. Cir. 1983).

When considering the sophistication of potential consumers, Board precedent requires the decision to be based on the least sophisticated potential purchasers. *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 1325, 110 U.S.P.Q.2d (BNA) 1157, 1163 (Fed. Cir. 2014). The Federal Circuit has recognized that while some people carefully select their bank after long and careful consideration, others do not. *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 842 F.2d 1270, 1274 (Fed. Cir. 1988). Also in the context of banking, the Board distinguished between the sophistication of corporate customers and members of the general public in *Crocker National Bank v. Canadian Imperial Bank of Commerce*, 228 U.S.P.Q. 689, 690 (Jan. 23, 1987). It is impermissible for nTrust to seek to impose on the service descriptions in its application and in Intrust's registrations a limitation that is not there. Neither nTrust's application nor Intrust's registrations are limited to sophisticated financial service consumers, and therefore, must be assumed to apply to all customers, even the unsophisticated. *Id*. Likewise, in *In re Green Bancorp, Inc*., Serial Nos. 78/659,563 and 78/659,571, 2011 TTAB LEXIS 382, *25 (Dec. 5, 2011) (unpublished), the applicant argued that the average consumer of financial services is more sophisticated than the average consumer and tends to exercise a high degree of care when entrusting their money to a financial institution. The Board found that, "because banks are federally insured, consumers do not have to investigate the financial stability of a particular bank to be sure that their money is secure . . . Thus, for purposes of determining likelihood of confusion, we do not treat bank customers as exercising more than ordinary care." *Id*. at *26.

There are no limitations on the types of people who can be Intrust customers. Elliott Dep., p. 31:19-21. They may range from individuals who did not graduate from high school, blue collar workers, and high school students to C.E.O.s and businesses. Elliott Dep., pp. 31:13-32:15. While some of these customers may have put great consideration into where to bank, others may not exercise any special care.

In addition, as nTrust has emphasized, it is not a bank. MacGregor Dep., p. 49:16-17. There is no evidence that its target customers, young people who need to send another person a small sum of money, usually around twenty dollars, would be especially careful when deciding which person-to-person payment method or card product to use. *Id*., pp. 54:10-55:8. nTrust emphasizes that the average amount that its customers deposit in an account is "quite low" and that it intends to target people who do not have bank accounts, such as overseas workers. Applicant's Brief at pp. 6-7. Thus, there is no evidence that customers of either Intrust or nTrust, the least sophisticated of whom should be considered, are particularly sophisticated or careful. This factor also favors Intrust.

E. **There Has Been Actual Confusion**

The instance of actual confusion described by Intrust is of particular significance, given the fact that nTrust has not expanded its operations to the United States (although it intends to do so in the future). Evidence of actual confusion is notoriously hard to obtain. *Trek Bicycle Corp. v. Fier*, 56 U.S.P.Q.2d (BNA) 1527, 1530 (T.T.A.B. 2000). Very little proof of actual confusion is necessary to prove the likelihood of confusion, and an almost overwhelming amount of proof would be needed to refute such proof. *World Carpets, Inc. v. Dick Littrell's New World Carpe*ts, 438 F.2d 482, 489, 168 U.S.P.Q. (BNA) 609, 615 (5th Cir. 1971). Evidence of non-consumer confusion can create an inference that consumers are likely to be confused, and bears a relationship to the existence of confusion on the part of consumers. *Rearden LLC v. Rearden Commerce, Inc*. 683 F.3d 1190, 1214, 103 U.S.P.Q.2d BNA 1161, 1177-78 (9th Cir. 2012).

In its response, nTrust seizes on the fact that the confusion in this case came from employees at FIS, a company that creates card products for financial institutions. Applicant's Brief at p. 42. If anything, however, FIS employees should be less likely to be confused as to whether Intrust is associated with nTrust. As stated by nTrust, it was the job of Ms. Canfarelli to have a

"heightened sensitivity" to Intrust's name. Applicant's Brief at p. 45. Given this sensitivity, one would expect that Ms. Canfarelli would be *less* likely to see a mark that did not belong to Intrust, yet be confused as to whether it was associated with Intrust. Yet Ms. Canfarelli, upon receiving a screenshot for the nTrust Cloud Money Card, was confused as to its origin and thought that it might have come from Intrust. Canfarelli Dep. p. 28:12-20. Given the fact that nTrust has not yet marketed its products to American consumers, that confusion has already occurred is significant and strongly favors denial of nTrust's application.[6]

F. **INTRUST's Marks Have Regional Renown**

Intrust has offered evidence sufficient to show that its marks are regionally renowned and entitled to a heightened scope of protection, and that nationwide recognition is not required. Opposer's Brief at pp. 25-27; *Berghoff Rest. Co. v. Wash. Forge, Inc*., 225 U.S.P.Q. (BNA) 603, 609 (T.T.A.B. 1985) (finding in favor of the Berghoff family restaurant enterprise, located exclusively in Chicago, Illinois, in its opposition to an application for the BERGHOF mark for cutlery. The court rejected the applicant's argument that the opposer's lack of national renown was fatal to its arguments). In response, nTrust counters that there is "limited regional recognition" because the INTRUST marks are used predominately in Kansas, Oklahoma, and Arkansas. Yet the regional renown that Intrust has shown is more than enough to entitle it to heightened protection based on its advertising and promotional efforts and the strong presence it has established in the markets that it serves.

Without addressing the significance of Intrust's advertising and promotional efforts, nTrust seeks to distinguish *Seacrets, Inc. v. Hotelplan Italia S.p.A.*, 2012 TTAB LEXIS 70 (March 8, 2012), on the grounds that the opposer in that case was a hotel, and "[a] bank is clearly not a travel destination like a hotel." Applicant's Brief at p. 34. This ignores the fact that the 15,000 seat

6 It is worth noting that, despite claiming that its services are different than Intrust's services, nTrust uses the same service provider to create card products.

Intrust Bank Arena is a travel destination that expands the scope of awareness of the INTRUST marks. nTrust argues, without support, that Intrust Bank Arena has "limited" exposure because it is not the home arena for any national or college sports teams. Applicant's Brief at p. 10. It is unclear why nTrust believes that a large venue has only limited exposure simply because the main act is Taylor Swift, rather than college sports. Many thousands of people are exposed to the Intrust name thanks to the arena sponsorship as well as Intrust's other branding and community outreach efforts.[7]

G. Channels of Trade Are Identical or Related

For purposes of the "channels of trade" *DuPont* factor, nTrust again seeks to distort the relevant inquiry. nTrust states it will offer its services only through online and mobile means. Applicant's Brief at p. 46. This, too, is irrelevant because nTrust's application does not provide such a limitation on the use of its mark or contain any restrictions on the channels of trade. It seeks a geographically unrestricted registration under which it might expand throughout the United States; so it is not proper to limit consideration of the likelihood of confusion to the areas presently occupied by nTrust and Intrust. *Carl Karcher Enters. v. Stars Rests. Corp*., 35 U.S.P.Q.2d (BNA) 1125, 1133. nTrust's services are presumed to travel in the same channels of trade and to the same class of purchasers as Intrust.

Moreover, as an online-only business, nTrust does not operate under the kind of geographic limitations that a brick-and-mortar business has. It is accessible by anyone with an internet connection. Further, it is well-established that banks, including Intrust, also offer their services through online and mobile means. *See* Opposer's Brief at pp. 2-3. This factor favors Intrust.

7 Indeed. The day after nTrust filed the brief in which it makes this statement about Intrust Bank Arena's "limited" exposure, Garth Brooks announced that he would be performing at the arena in December and sold a record 65,000 tickets in less than one hour. Annie Calovich, Garth Brooks adds four concerts to Wichita stop, sells 65,000 tickets in an hour, *Wichita Eagle*, October 23, 2015, available at http://www.kansas.com/entertaincment/music-news-reviews/article41180703.html . To the extent nTrust seeks to portray Intrust as not having any exposure beyond its bank branches, these ticket sales provide an example of the kind of regional fame Intrust has achieved.

H. **Intrust Has Protected Its Marks**

Intrust has consistently taken steps to protect its marks and enforce its trademark rights where it has identified potential confusion arising from an applicant's similar mark. The chart that nTrust includes on pages 35-37 of its brief purports to show a "crowded" field of similar marks. In fact, it demonstrates that there are relatively few marks with a name similar to INTRUST, and that none of them present a likelihood of confusion like the NTRUST marks. Some of the marks are no longer active, and those that remain, offer services very different from Intrust, have only a remote possibility of exposure to Intrust customers due to their operation in a restricted geographic area, and/or have reached a settlement with Intrust:

Trademark	**Registration/Use Exhibits**	**Distinguishing Exhibits**	**Distinguishing Details**
ENTRUST FINANCIAL	I-3 J-12 J-13	L-12 L-13	Company specializes in retirement planning, with one location in Wayne, Pennsylvania.
THE ENTRUST GROUP THE ENTRUST GROUP GREEN IRA	I-4 I-5	L-5 L-6 L-7 J-14	IRA administrator that does not have any Kansas locations.
WINTRUST MORTGAGE	I-6 J-23	J-23	Part of Wintrust Financial Corporation, a financial holding company with locations that are all in the Chicago area.
WINTRUST COMMERCIAL BANKING	I-7 J-23	J-23	Like Wintrust Mortgage, this entity is part of Wintrust Financial Corporation, located in the Chicago area. The "Win" prefix is commercially distinct from the "In" prefix.
MNTRUST	I-8 I-9	J-17	This company does cash management for school districts in Minnesota, and the first two letters of its name ("MN") is a reference to Minnesota, which is commercially distinct from the "In" prefix.
ALLIANCE ENTRUST	I-10 J-1 J-7	L-4	This wealth management company has only one location, in Westlake Village, California.

Trademark	**Registration/Use Exhibits**	**Distinguishing Exhibits**	**Distinguishing Details**
MNTRUST (& design)	I-11 J-17	L-16 L-17 L-18	The company is actually called Millennium Trust Company. It is located in Oak Brook, Illinois.
MTRUST	I-12	L-20	There is no separate web presence for this company. The registrant of mark has surrendered its business entity in California.
NTRUST FINANCIAL	I-13	L-21	There is no federal trademark registration, just an application for service mark in Massachusetts that expired in 2012. A search of the Massachusetts Secretary of State website did not reveal any businesses called "NTrust Financial."
ENTRUST ADMINISTRATION, INC. (& design)	I-14 J-3	L-1	The last listed owner was of this mark was Entrust Group, which is the IRA administrator with registration I-4. This mark is dead, and there is no separate web presence for "Entrust Administration."
ENTRUST ENTRUST FEDERAL CREDIT UNION – ENTRUST US WITH YOUR FUTURE (& design)	I-15 I-16 I-17 I-18 I-19		Intrust challenged Entrust's Federal Credit Union's use of the "Entrust" name, and the parties agreed to a settlement pursuant to which the use of the "Entrust" name would be restricted, and the registration canceled. *See* Opposer's Brief at pp. 27-28.
NTRUST	I-1	L-19	Ntrust is a service provided to educational institutions for receiving student loan funds and reports. It is provided by a company called Nelnet, which does education planning and financing.
NTRUST	I-2	I-2	Mark is registered by a company called NTirety, Inc. in connection with database administration.

Trademark	Registration/Use Exhibits	Distinguishing Exhibits	Distinguishing Details
ENTRUST BANKCARD	J-4 J-5 J-8 J-9 J-10	L-10 L-11	Intrust sued the owner of this registration for its use of the ENTRUST BANKCARD mark. It agreed to change its name and the entrustbankcard.com webpage is not operational. *See* Opposer's Brief at p. 27.
NTRUST WEALTH MANAGEMENT	J-20 J-21	J-20 L-3	This mark is dead, and the business had only one location, in Virginia Beach, Virginia.

nTrust also identifies unregistered business names as "marks" even though the so-called "marks" do not show up on the Trademark Electronic Search System ("TESS") operated by the United States Patent and Trademark Office.[8] Most of them do not appear to be active businesses:

Name	Use Exhibit	Distinguishing Exhibits	Distinguishing Details
Entrust Financial Administration, Inc.	J-2	J-2	There is no registered mark and it is unclear from the evidence offered by nTrust whether this is an active business.
Entrust Capital Fund	J-11	J-11	There is no registered mark, and the company offers investor services with one office located in New York.
Intrust Mortgage Services	J-6	J-6	There is no registered mark, and the contact phone number listed on Exhibit J-6 is disconnected.
nTrust Financial LLC	J-19 J-22	J-19 J-22	There is no registered mark, and the business is (or was) located in Scottsdale, Arizona. The website attached as Exhibit J-22 is no longer active.

I. Intrust Has Demonstrated That the Extent of Potential Confusion is Substantial

According to nTrust, it does not plan to operate in the states where Intrust has physical locations. Applicant's Brief at p. 47. Yet it does not deny that as an online business, it is

8 State registrations are of limited probative value, and do not establish that consumers perceive the term as a trademark or are even aware of the use of that term. *Allure Furniture & Mattress, Inc., v. J. Becker Mgmt*., 2015 T.T.A.B. LEXIS 347 *14 (T.T.A.B. Sept. 1, 2015) (unpublished); *Faultless Starch Co. v. Sales Producers Assocs*., 530 F.2d 1400, 189 U.S.P.Q. (BNA) 141, 142 n.2 (C.C.P.A. 1976)

accessible to anyone with an internet connection. Moreover, because nTrust seeks a geographically unrestricted registration, Section7(b) of the Trademark Act of 1946, 15 U.S.C. § 1057(b), creates a presumption that nTrust would have exclusive right to use its mark throughout the United States. *Carl Karcher Enterprises*, 35 U.S.P.Q.2d (BNA) at 1133. Regardless of what nTrust says it plans to do, it is seeking to register a mark to which it would have an exclusive right anywhere in the United States and which it would be able to use in order to market services that compete with banks. *See* MacGregor Dep., pp. 22:18-23:5; 31:12-25; Exs. K-18, K-19. The extent of potential confusion is substantial.

J. nTrust's Interpretation of the "Market Interface" *DuPont* Factor Is Wrong

Finally, nTrust argues that there is no market interface because Intrust has not launched online person-to-person money transfer services. This has nothing to do with the "market interface" *DuPont* factor. Instead, this factor allows the Board to consider whether nTrust has ever entered into a consent agreement with the owner of a prior mark. *In re Majestic Distilling Co., Inc*., 315 F.3d 1311, 1317-18, 65 U.S.P.Q.2d (BNA) 1201, 1205-6 (Fed. Cir. 2003); *In re Skipper's Gifts & Jewelry, Inc.,* 201 U.S.P.Q. (BNA) 609 (T.T.A.B. 1978); *In re S.A. G.H.H. Martel et Cie*, Serial No. 75/002,400, 2002 TTAB LEXIS 688, *19 (Oct. 29, 2002) (unpublished). This factor is not an issue in this case.

IV. **Conclusion.**

Because Intrust has established that a likelihood of confusion exists between the NTRUST and INTRUST marks, nTrust's application should be denied.

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Dated: November 30, 2015

RESPONSES TO EVIDENTIARY OBJECTIONS

I. Opposer's Exhibits 130 Through 133 Have Been Authenticated and Are Admissible

Because Intrust has provided evidence sufficient to support a finding that the emails and attachments appearing in Exhibits 130, 131, 132, and 133 are, in fact, emails exchanged by Fidelity Information Services ("FIS") employees, Intrust has properly authenticated these exhibits. *See* Fed. R. Evid. 901. Although nTrust correctly states that Rule 901 requires proponents to authenticate or identify their evidence, nTrust's demand—that authentication occur by personal recollection to a virtual certainty—finds no support in Rule 901. On the contrary, Rule 901 lists "Testimony of a Witness with Knowledge" as merely one of the "examples only—not a complete list—of evidence that satisfies the [authentication] requirement[.]" Fed. R. Evid. 901(b). Also appearing on that nonexhaustive list is authentication by "Distinctive Characteristics and the Like." Fed. R. Evid. 901(b)(4). Thus, the rule allows authentication by "[t]he appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances." *Id.*

Circuit courts assessing evidence under Rule 901 have opined that, "all that is required is a foundation from which the fact-finder can infer that the evidence is what the proponent claims it to be." *Air Land Forwarders, Inc. v. United States*, 38 Fed. Cl. 547, 553-54 (1997) (citing Fed. R. Evid. 901(a)); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985)). In assessing that foundation, "[a]bsent controlling legislation, the testimony of a subscribing witness is not necessary to authenticate a writing. In fact, authentication by circumstantial evidence is uniformly recognized as permissible." *Id.* at 554 (citing Fed. R. Evid. 903; *McQueeney*, 779 F.3d at 928; McCormick on Evidence § 222 (4th ed. 1992)).

Only a few federal appellate decisions have directly addressed Rule 901 and emails. In those decisions, the courts have considered characteristics such as (1) the validity and ownership of

involved email addresses, *United States v. Fluker*, 698 F.3d 988, 999 (7th Cir. 2012); *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000); (2) the circumstances in which messages were sent, *see, e.g.*, *Fluker*, 698 F.3d at 999 ("It would be reasonable for one to assume that an MTE Board Member would possess an email address bearing the MTE acronym and have the capacity to send correspondence from such an address."); (3) the context of the messages themselves, *id.* at 1000 (stating that "[t]he context of the emails" showed the author's "significant knowledge" of pertinent facts, as demonstrated—in that case—by email discussion of bank accounts, program participation, and transaction details); *Siddiqui*, 235 F.3d at 1322-23; and (4) inclusion of details not publicly known, *see United States v. Vayner*, 769 F.3d 125, 132-33 (2d Cir. 2014) (discussing authentication of a social media profile page).

In light of the witness testimony given and the authenticating characteristics of the emails themselves, Intrust's Exhibits 130-133 are authenticated and admissible, as detailed below.

1. **Exhibit 130**

As nTrust has conceded, Geno Reed—a graphic designer at FIS—testified that the screenshot on page 1 of this Exhibit accurately reflects the site that FIS uses to upload client images. Applicant's Brief at p. A-1 (citing Reed Dep., p. 17:1–8). Mr. Reed not only recalled receiving the artwork on pages 2 and 3, Reed Dep., pp. 21:22–22:10, but he also testified that page one: (1) is an accurate capture of the site used to receive client art, (2) shows that the art was sent to his correct email address (geno.reed@fisglobal.com), and (3) includes a second email address (design@metavante.com) simply because FIS had purchased a company called Metavante. Reed Dep., pp. 17:16–1817; 22:4–10; 18:19–19:2; 19:5–21:4.

nTrust seeks the exclusion of this Exhibit based on Mr. Reed's testimony that he could not recall physically taking the screenshot or adding the red arrow and that he was not the designer who ultimately worked with the art on pages 2 and 3. Applicant's Brief, pp. A-1& A-2. Neither of

these things are preconditions to the Exhibit's admissibility, however. Rule 901 exists to ensure that an "item is what the proponent claims it is." Fed. R. Evid. 901(a). Between Mr. Reed's testimony and the characteristics of the item itself—page 1's clear display of the upload site's logo ("LEAPFILE" in the upper lefthand corner), relevant email addresses (sending and receiving), and an attachment list (showing two .psd and one .jpg files, at the bottom of the screenshot)—Intrust has presented enough evidence to support a finding that Exhibit 130 is what it appears to be: images of the client art nTrust submitted to FIS and the process by which that art was electronically delivered to Mr. Reed.

2. **Exhibit 131**

Exhibit 131 shows two emails—each of which were authenticated via the deposition testimony of witnesses with knowledge. The top of page 1 of Exhibit 131 shows an email to Jennie Githens from Debbie Canfarelli. Ms. Canfarelli testified that she sent the email. Canfarelli Dep., pp. 20:4–22:3. The bottom of page 1 of the Exhibit shows an email, sent and signed by a "Tammy," from Geno Reed's email account to all email accounts in "Romeoville – Client Services." As nTrust pointed out, Mr. Reed testified that his backup, Tammy, sent the email from his account. Applicant's Brief at p. A-2 (citing Reed Dep., pp. 26:4–27:8). Mr. Reed further testified that Tammy has access to his account and that she is the only other person who does. Reed Dep., pp. 26:22–27:8; 30:17–22. Ms. Canfarelli testified that she remembered receiving the email sent from Tammy via Mr. Reed's account, Canfarelli Dep., pp. 22:10–23:25, and she recalls her thought process in choosing to forward the email on to Jennie Githens at Intrust, Canfarelli Dep., pp. 24:16–27:7. The only thing that Ms. Canfarelli could not testify to with complete confidence was whether the image on page 2 of the Exhibit is the identical artwork that was attached to the emails. Canfarelli Dep. 24:1–25:13. Nonetheless, Ms. Canfarelli testified that she had no reason to doubt that the artwork appears as originally sent. Canfarelli Dep., p. 25:14–24.

Additionally, the authenticated emails on page 1 show that the attached artwork file was named "nTrust Cloud Money Card.pdf." Looking at the artwork on page 2, it is an image of a blue card, on which the only items appearing are a small logo and the words "nTrust" and "cloud money." Given the complete match between the image on page 2 and the descriptive title of the .pdf file on the authenticated email of page 1, there is sufficient evidence to support a finding that Exhibit 131 contains the image that Ms. Canfarelli remembers emailing to Jennie Githens.

3. **Exhibit 132**

Mr. Reed testified that this email was sent from his email address to Paul Koldenhoven and Bastian Knoppers. Reed Dep., pp. 14:6–15:6. He further testified that if he did not personally compose the email, then it would have been sent on his behalf by his "backup," Tammy. Reed Dep., pp. 15:17–16:1. nTrust objects to this four-page Exhibit exclusively on the ground that, "Mr. Reed could not recall preparing the email at the bottom of the first page of Exhibit 132, and that it could have been sent by someone else." Applicant's Brief at p. A-2. As discussed above, however, evidentiary rules do not require personal-knowledge testimony to authenticate documents. Rather, the email's characteristics—the display of Mr. Reed's email account as the sender, the inclusion of Mr. Reed's name and contact information in the signature block, and the allusion to FIS clientele—authenticate the document. Mr. Reed's testimony, that either he or his backup sent the email from his email address, further supports the inference that the e-mail is, indeed, a communication among FIS employees about, as the Subject Line describes, the "nTrust Cloud Money Card."

4. **Exhibit 133**

This Exhibit also displays Mr. Reed's e-mail address, geno.reed@fisglobal.com; Mr. Reed's contact information in the signature block; and mention of "art files" and "custom art specs" on pages 1 and 2. Given these characteristics, the context provided by the remaining pages of the Exhibit, and Mr. Reed's testimony that emails from his account are sent either by him or on his behalf, nTrust's objection—that Mr. Reed could not testify about his individual recollection of every single email in the Exhibit—is unavailing.

In summary, Federal Rule of Evidence 901 does not require the testimony of witnesses with personal knowledge. As federal appellate courts have discussed, circumstantial evidence is sufficient, and "distinctive characteristics" are merely one type of acceptable evidence that can authenticate a document. Given the testimony that Mr. Reed and Ms. Canfarelli were able to give, along with the distinctive characteristics of the Exhibits themselves, which display individual e-mail addresses, descriptive subject lines, and references to FIS information, Intrust's Exhibits 130, 131, 132, and 133 are authentic and admissible.

V. Intrust's Disclosures Were Timely

Contrary to nTrust's assertion, Intrust did disclose Kimberly Klocek as a witness in its Pretrial Disclosures in November 2013. Opposer's Pretrial Disclosures, Nov. 12, 2013 (attached hereto as Exhibit A). In requesting that Ms. Klocek's testimony be set aside, nTrust relies on TBMP rules and precedent concerned with the failure to reveal witnesses in pretrial disclosures. *See* Applicant's Brief at p. A-2. Because Ms. Klocek and her identifying information appear on page 4 of Intrust's Pretrial Disclosures, nTrust's arguments are not fully apposite.

It is true that Intrust had not identified Ms. Klocek as a potential witness in time for its initial disclosures of August 7, 2012. Nevertheless, Intrust subsequently made full and appropriate disclosure of Ms. Klocek in both its Response to nTrust's First Interrogatories on October 7, 2013

(attached hereto as Exhibit B), and again in its Pretrial Disclosures of November 12, 2013. A look at the progression of this case's pretrial activities shows that Intrust has kept nTrust properly informed about its witness list. Soon after Intrust made its initial disclosures—and before nTrust had made its own—the parties agreed to suspend the case to attempt settlement. *See* Motion for Suspension for Settlement with Consent, Doc. 7. Thus, on October 23, 2012, the case was voluntarily suspended for 180 days. Doc. 8. Accordingly, nTrust did not make its own initial disclosures until July 2, 2013. It was only three months after that time, at the outset of discovery, that Intrust disclosed Ms. Klocek as a witness. *See* Ex. B. Intrust's disclosures occurred well in advance of the rule's deadline, which requires pretrial disclosures at least fifteen days prior to the opening of a party's testimony period. TBMP § 702; 37 CFR § 2.121(e). Intrust's testimony period did not begin until February 25, 2014. Docs. 7, 8.

This timeline shows that Intrust not only complied with pretrial disclosure requirements, but also acted appropriately to provide information supplemental to its initial disclosures once it identified Ms. Klocek as a potential witness. Furthermore, Intrust provided proper notice of the deposition itself, and nTrust's counsel attended Ms. Klocek's deposition in person and had the opportunity to cross-examine her. Klocek Dep., pp. 1:24–2:3, Mar. 25, 2014. That deposition occurred nearly six months after Intrust first disclosed Ms. Klocek via its first response to interrogatories. Thus, because Intrust properly disclosed Ms. Klocek in its interrogatory answers and pretrial disclosures, nTrust was neither surprised nor prejudiced by Ms. Klocek as a witness, and because nTrust had an opportunity to meaningfully cross-examine Ms. Klocek, her testimony, including her authentication of exhibits, is admissible.

Finally, this case is distinct from those in which the Board has excluded witness testimony for lack of notice. nTrust cites *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 U.S.P.Q.2d (BNA) 1443 (T.T.A.B. 2009), in which the Board did strike witness testimony. In that case,

however, the party in question had not only failed to initially disclose its only witness, but had also failed to provide the required pretrial disclosures. *Id.* at 1443. The result was that the responding party's *only* notice of the witness's existence was a fourteen-day notice of the deposition itself. *Id*. The consequence of this complete lack of appropriate notice was that the responding party (1) had "relied on petitioner's lack of disclosure . . . to indicate that petitioner intended to introduce only documentary evidence" and (2) had just two weeks to prepare for a deposition, which it then attended via telephone. *Id.* at 1443–44. It was under these circumstances this Board found that, "[b]ecause Mr. Clayman [the deponent] is the type of surprise witness that pretrial disclosure practice is intended to discourage, respondent's motion to strike is hereby granted." *Id.* at 1445. In the circumstances of the instant case, however, nTrust received timely and appropriate notice of Ms. Klocek not only in Intrust's pretrial disclosures, but also in Intrust's response to interrogatories. Further, nTrust had ample time to determine and implement its own course of action with regard to Ms. Klocek.

Although the Board was willing in *Spier Wines (PTY) Ltd. v. Shepher*, 105 U.S.P.Q.2d (BNA) 1239 (T.T.A.B. 2012), to preclude testimony despite pretrial disclosure, that decision was based on facts very different from this case. In *Spier Wines*, an opposer failed to initially disclose a witness and then continued to remain silent about that witness for the next four years. *See id.* at 1240. Whereas Intrust disclosed Ms. Klocek in its response to nTrust's first interrogatories, the opposer in *Spier Wines* made no disclosure until more than one year after discovery had ended. *Id*. Not only was this delay in disclosure significant, but it also prevented the objecting party from deposing the witness, indicating prejudice. *See id.* at 1241. These facts are distinct from those of the instant case. In fact, the Board suggested that the testimony in *Spier Wines* could have remained admissible if the party had followed the same course of action that Intrust has taken: "Alternatively, opposer could have facilitated the exchange of information between the parties

during the course of discovery by supplementing its discovery responses to identify Ms. Jell [the witness]." *Id.* at 1243. Thus, nTrust's objection does not rise to the level of TTAB precedents for excluding testimony following disclosure.

Because Intrust effectively supplemented its initial disclosures in its first discovery responses, and because Intrust properly identified Ms. Klocek in a timely pretrial disclosure, Intrust respectfully urges the Board not to disturb Ms. Klocek's testimony.

VI. Exhibits M-1 through M-7 Are Deposition Exhibits That Rebut or Impeach nTrust's Evidence

Intrust properly offered Exhibits M-1 through M-7 to rebut both nTrust's specific arguments and the general case theories that nTrust has adopted and propounded. TTAB precedent has described rebuttal evidence as evidence "submitted for the proper purpose of denying, explaining, or discrediting applicant's case" as opposed to evidence submitted only to bolster a case-in-chief. *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 U.S.P.Q.2d (BNA) 1629, 1632 (T.T.A.B. 2007) (unpublished). In applying this basic rule, the Board has allowed rebuttal evidence appearing to address an opposer's principal case when that evidence responds to an applicant's litigation theory or case framework. *See Visual Info. Inst., Inc. v. Vicon Indus., Inc.*, 209 U.S.P.Q. (BNA) 179 (T.T.A.B. 1980). In *Visual Information*, the Board allowed testimony during the opposer's rebuttal period that was "essentially designed to 'put to rest' any doubt as to the relationship of the products of the parties." *Id.* at 183. The Board explained that although "[a]t first blush, it would appear that this testimony is likewise clearly the subject of [the opposer's] principal case since it is entirely related to the question of likelihood of confusion," the applicant had "consistently attempted to restrict the area of use for [opposer's] equipment . . . and to emphasize the special identifiable channels of its goods . . . to create a dichotomy between the respective products of the parties and thereby instill the impression in the trier of fact that there is no viable relationship between them." *Id.* In that context, the opposer "was justified in perceiving a definite need to place this question in

its right perspective" and the testimony on that point was "proper rebuttal in that it attempt[ed] to rebut any improper inference to be drawn from [applicant's] theory of the case . . . ." *Id.* Thus, where nTrust's Notice of Reliance included documents indicating its intention of framing the financial and banking industries as completely independent and disconnected fields, Intrust can properly present evidence to rebut nTrust's broad litigation theory.

1. **Exhibits M-1 Through M-4 Supplement Earlier Exhibits and Rebut nTrust's Evidence.**

Exhibits M-1 through M-4 contain printouts of the nTrust website, earlier versions of which Intrust introduced during its case-in-chief. *See* Opp'n First Notice Reliance, Exs. A-1 through A-44, Mar. 27, 2014. Exhibits M-1 through M-4 merely show changes that nTrust has subsequently initiated on its site, which continued to change even after Intrust's testimony period closed. *See* MacGregor Depo. 86:4–17, Mar. 17, 2015 (testifying that the site is "routinely" changed and that Exhibit M-1 displays the site as it appeared on March 11, 2015). Notably, when this Board first allowed parties to submit Internet pages through notices of reliance, it considered the reality of a website in flux: "Due to the transitory nature of the Internet, the party proffering information obtained through the Internet runs the risk that the website owner may change the information contained therein. However, any relevant or significant change to the information submitted by one party is a matter for rebuttal by the opposing party." *Safer, Inc. v. OMS Inv., Inc.*, 94 U.S.P.Q.2d (BNA) 1031, 1039 (T.T.A.B. 2010). This ruling makes clear that nTrust could have introduced the same updated website prints that Intrust did introduce in Exhibits M-1 through M-4, had it been advantageous for nTrust to do so. In addition, the *Safer* decision dealt with the submission of Internet publications from *third-party* sites. *See id.* at 1036. Here, where it is nTrust—the opposing party—who owns the site and can opt to change it, Intrust should be allowed to introduce exhibits that contain new versions of the site not in existence during its testimony period.

Second, Intrust's submission of Exhibits M-1 through M-4 fall under the category of appropriate rebuttal evidence. As discussed, the TTAB allows rebuttal evidence for the purposes of denying, discrediting, or explaining applicant evidence, as well as for broadly refuting the applicant's theory or characterization of the case. Exhibits M-1 through M-4 serve both of these rebuttal goals. Generally, the Exhibits respond to nTrust's erroneous theory that the parties offer completely different services in completely separate fields. The Exhibits show a list of nTrust services that include items—such as ATM withdrawals and physical cards—traditionally offered by banks. *See* Ex. M-1–M-2. The Exhibits also show that nTrust considers "Is nTrust a bank?" to be a "Frequently Asked Question" and that nTrust uses "major online banking application[s]" as a comparator for describing the safety of its services. Ex. M-3. Finally, they show that nTrust uses banking standards to inform its compliance practices. *See* Exs. M-3, M-4 at 2, para. 4.

Specifically, Exhibits M-1–M-4 rebut nTrust's Exhibits Category F, H, and I. In Category F, nTrust attempts to "explain money transmitter or money transfer services" and show that they are not banking services. *See* Doc. 30, Applicant's First Notice Reliance. Not only do Exhibits M-1 through M-4 rebut this notion, they also indicate that nTrust offers more than just money transmission or transfer services. In Category H, nTrust sought to show that, because other parties have registered marks for services similar to nTrust's in nonbanking categories, there is no overlap between banking and financial services. *See* Doc. 31, Applicant's Second Notice Reliance. Exhibits M-1 through M-4 demonstrate that regardless of how third parties have registered their marks, there is overlap between banking and finance. The Exhibits show that nTrust offers ATM and card services, identifies bank-related topics on its own Frequently Asked Questions page, and promotes its services as having bank-level security. Thus, they rebut the manner in which Exhibit Category H frames the issues of this case. Finally, in Category I, nTrust offers exhibits containing marks it believes to be similar to the Intrust family of marks. *See* Doc. 30, Appl. Second Notice Reliance at

6. Exhibits M-1 through M-4 rebut the aims of Exhibit Category I by showing nTrust to be similar to Intrust in ways that the Category I marks and services are not—namely, in appearance, services offered, trade channels, customer bases, and markets targeted.

Thus, because Exhibits M-1 through M-4 are merely the current versions of pages offered during Intrust's testimony phase and subsequently altered by nTrust, and because each of these four Exhibits plays a role in rebutting nTrust's evidence and characterization of the issues, these Exhibits are proper and were properly offered during Intrust's rebuttal phase.

2. **Exhibits M-5 Through M-7 Were Proper Rebuttal, and M-5 Through M-6 Impeach Portions of Robert MacGregor's Deposition Testimony.**

Exhibits M-5 through M-7 similarly rebut nTrust's theory of the case and Exhibit Category F by showing that nTrust's own materials do not draw a neat line between the world of banking and the world of financial services. In Exhibit M-5, an article quotes nTrust's founder as he explains how his ability to identify risk is key to "operat[ing] in the world of banking." Ex. M-5 at 2. It also highlights nTrust's efforts to become certified according to banking standards. Ex. M-5 at 2. Exhibit M-6 shows nTrust's LinkedIn page, on which nTrust posted a link to the article in Exhibit M-5 and captioned it, "Minding your business: With a lawyer at its helm, nTrust understood from the start that if you want to operate in the world of banking, you have to know the rules." Ex. M-6 at 1. Exhibit M-7 shows that, among the "tags" or links appearing at the bottom of an nTrust webpage promoting its international money transfers, the site linked to topics such as "bank transfer" and "bank wire." This blurring of bank and finance issues belies nTrust's theory that Intrust and nTrust operate in two completely separate worlds. Consequently, these Exhibits are appropriate rebuttal material.

In addition, Intrust offered Exhibits M-5 and M-6 to impeach Robert MacGregor's deposition testimony. In his deposition, Mr. MacGregor, nTrust's founder, testified that nTrust operates in the finance world, but does not operate in the banking world. MacGregor Dep. 109:15–

21 (Question: “Does nTrust operate in the banking world?” Answer: “No.”). Exhibits M-5 and M-6 impeach this testimony because they include a quote from Mr. MacGregor in which he discusses what it takes to “operate in the world of banking.” In addition, Exhibit M-5 quotes Mr. MacGregor as explaining that “[y]ou have to deal with banks if you want to move money—they’re gatekeepers. So we had to be part of their ecosystem, we had to get them comfortable with us.” Ex. M-5 at 3. nTrust argues that Mr. MacGregor’s eventual concession that he was not misquoted renders these Exhibits improper for impeachment. *See* Applicant’s Brief at p. A-5. In fact, Mr. MacGregor’s concession shows not that these documents were inappropriate impeachment evidence, but rather that they effectively impeached Mr. MacGregor’s testimony in precisely the manner that the rules of evidence allow.

In sum, because Exhibits M-1 through M-7 appropriately rebut nTrust’s evidence and its broader characterizations of the issues in this case, they are proper rebuttal exhibits.

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Dated: November 30, 2015

CERTIFICATE OF SERVICE

I certify that a copy of **Opposer's Reply Brief on the Merits** was mailed U.S. Mail, first class, postage prepaid, to counsel of record as follows:

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